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IN THE

Supreme Court of the United States

October Term, 1957

No. 914

JOSEPH GERNIE and EDWARD OGULL,
Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB W. FRIEDMAN,
Attorney for Petitioners,
170 Broadway,
New York 38, N. Y.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Joseph Gernie and Edward Ogull, by their attorney, Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court imposed a prison sentence on each of the petitioners.

Opinions Below

The opinion of the Court of Appeals is not yet reported, and a copy is hereto appended. There was no opinion by the District Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on February 13, 1958. A motion was duly made in that Court for rehearing, and denied on March 12, 1958.

The jurisdiction of this Court is invoked under: 18 U. S. C. 2(a); 21 U. S. C. 173, 174; 18 U. S. C. 371; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); Federal Rules of Criminal Procedure, Rule 17c.

Questions Presented

1. Whether this record presents any evidence whatsoever that petitioner Joseph Gernie committed a crime or that he conspired so to do. Whether the trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion. Whether the standard of evidence necessary to send a case to the jury in a criminal prosecution is, as contended by the Government, the same as in a civil action. Whether the Second Circuit rule so declaring is a proper one although admittedly in conflict with the law as enunciated in other Federal Circuits, including the Third, Fifth, Seventh, Eighth, Ninth, Tenth and the District of Columbia.

2. Whether the curtailment of cross-examination regarding one Berner, a paid Government informer in this and other cases, coupled with the Government's failure to produce him or to account for his absence, was not in contravention of this Court's recent holding in *Roviaro* v. *United States*, 353 U. S. 53, 1 L. Ed. 2d 639

3. Whether it was not improper and prejudicial to petitioners for the Government to place on the stand a witness who it had reason to believe would, and actually did, in the presence of the jury, invoke the Fifth Amendment.

4. Whether it was not error to deny the defense motion to dismiss on the ground that entrapment of petitioner Edward Ogull was established.

5. Whether it was not error to refuse a mistrial after the reception of incompetent and unresponsive testimony that petitioner Edward Ogull planned to engage in the operation of a gambling house in violation of the California Penal Code.

6. Whether it was not error to deny a motion to strike incompetent and prejudicial testimony that petitioner Joseph Gernie at the time of his arrest had in his possession a certain marked bill more than two months after it had been paid to another person for narcotics by a Government agent.

7. Whether in charging on the credibility of witnesses found to have testified falsely in one respect, the trial Court did not err in omitting the necessary qualifications that the testimony involved had to relate to material facts.

8. Whether in any event the cumulative effect of the errors urged was not such as to deprive petitioners of a fair trial.

Statutes Involved

TITLE 18, UNITED STATES CODE

§ 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, § 1, 62 Stat. 701.)

TITLE 21, UNITED STATES CODE

§ 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is

summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, § 2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, § 3, 46 Stat. 586.)

TITLE 21, UNITED STATES CODE (1952), (PRIOR TO AMENDMENT OF JULY 18, 1956, 70 STAT. 570)

§ 174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173

and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. § 666, §§ 1, 5(1), 65 Stat. 767.)

TITLE 21, UNITED STATES CODE (SUPP. IV, 1957) (AS AMENDED JULY 18, 1956, 70 STAT. 570)

§ 174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such nar-

cotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

Statement

Petitioners appealed in the first instance from a judgment of the United States District Court for the Southern District of New York rendered February 19, 1957, convicting them of certain alleged violations of the narcotic laws (21 U. S. C. 173, 174) and conspiracy (18 U. S. C. 371), after trial before Palmieri, D. J., and a jury. Two other defendants indicted with them (Buzzeo and Mayer) had pleaded guilty. The indictment contained seven counts, the fourth of which was withdrawn. Of the remaining six counts, four charged that defendants "wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug"; one, against petitioner Gernie and defendant Mayer, included a charge

of possession; and the last charged conspiracy continuing down to October 19, 1956—although petitioner Gernie was arrested on September 18 and petitioner Ogull on October 4.

Petitioner Gernie was sentenced to 10 years' imprisonment and fined $5,000; petitioner Ogull was sentenced to 5 years' imprisonment.

The facts will be discussed in connection with the respective questions to be argued.

Reasons for Granting Writ

The argument has consistently been made by petitioners below, and they reiterate it in this Court, that they are innocent—Gernie by reason of having no connection with or participation in the offenses charged; and Ogull by virtue of having been entrapped by Government agents and not otherwise. Petitioners recognize that this is not the forum for the presentation of questions of fact. However, the facts necessary to sustain a conviction are absent as to one petitioner (so much so as to render grossly erroneous the submission of the issue to the jury), while as to the other the facts are such as to necessitate his exoneration. In any event their innocence is certainly not a factor which should detract from the validity of the arguments they advance in any appellate tribunal.

Quite apart from the foregoing, the opinion of the Court of Appeals presents several questions of law, upon which the determination reached is in conflict with controlling opinions of the Supreme Court of the United States. The rulings of the Trial Court, heretofore sustained on appeal, constitute prejudicial and reversible error. In some instances, as will be demonstrated, the holding of the Court of Appeals is at variance with the holdings of other Federal Courts of Appeals on the same matters. This diversity of opinion in different circuits relates to important questions of Federal law which should be settled by this Court.

In view of the requirements of the rules that the questions presented for review be expressed without unnecessary detail, an attempt will be made to set forth these matters as concisely as is consistent with the necessities of the case.

Numerical references will relate to pages of the minutes of trial, appended so far as pertinent to the brief in the Court of Appeals.

ARGUMENT

Question No. 1

Whether this record presents any evidence whatsoever that petitioner Joseph Gernie committed a crime or that he conspired so to do. Whether the Trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion. Whether the standard of evidence necessary to send a case to the jury in a criminal prosecution is, as contended by the Government, the same as in a civil action. Whether the Second Circuit Rule so declaring is a proper one although admittedly in conflict with the law as enunciated in other federal circuits, including the Third, Fifth, Seventh, Eighth, Ninth, Tenth and the District of Columbia.

In this, as in the other questions, we do not propose herein to reiterate all arguments adduced in support of our contention that are contained in our briefs in the Court of Appeals. Attention, however, is directed to those arguments, which are valid for all purposes of this petition. We shall confine ourselves to certain additional observations, believing them to be most pertinent in justifying a further review.

At the outset, it cannot be gainsaid that the innocence of an accused is the fundamental question in any judicial inquiry as to the validity of a conviction. At no stage herein has any appellate tribunal been asked to substitute its opinion for that of the jury. We do contend that the evidence against petitioner Gernie did not measure up to the minimum standard required to justify its submission to the jury.

Nor do we limit the Court to our own review of the evidence. The case's determination may be made upon an inspection of the record, or the Government's analysis of the evidence or, indeed, the summary contained in the opinion of the Court of Appeals (notwithstanding several inaccuracies in the recital). The evidence against Gernie consisted of nothing more than a series of meetings, conversations (contents undisclosed) and innocuous activities. They were wholly unexplained and co-extensive in time with but a minute portion of the offenses charged. They were so utterly consistent with innocence as to constitute no warrant for permitting a jury to speculate on an issue tending towards the deprivation of liberty.

The Government itself advanced the theory, and adhered thereto, that the circumstantial evidence against petitioner Gernie was sufficient, while the Court of Appeals (p. 665) declared that it found an abundance of "evidence both direct and substantial" to support the verdict. This language was employed with respect to four defendants, and surely it may not be regarded as referring to petitioner Gernie. In any event the Government could not properly deviate from its original theory. See 24 C. J. S. 674, and cases cited. The extraordinary attitude of the Court of Appeals is exemplified by the observation of Learned Hand, Circ. J., on the oral argument to the effect that if this were a civil action rather than a criminal prosecution, the direction of a verdict would have been required. Unless this remark is interpreted as the direction of a verdict of acquittal, we must respectfully take issue with it.

As we attempted to urge in our reply brief below, pursuing the analogy of a civil action, we assumed that all of the evidence in the record had been presented in a civil action against petitioner Gernie for breach of warranty of quality of narcotics lawfully purchased and sold. We made the assumption that in addition to the proof in the record there was also adequate evidence that the heroin did not answer the description. On such proof, if petitioner Gernie were sought to be held civilly liable for damages sustained, any trial court would unhesitatingly dismiss at the close of the buyer's case because of the complete failure to show that petitioner Gernie was connected with the transaction as vendor of the merchandise or in any other imaginable capacity. Therefore, since the explicit theory of prosecution (Government brief below, p. 7) was that petitioner Gernie was the seller and source of the heroin, the application of the parallel rule as to *prima facie* case in civil actions does not aid the Government in the slightest degree.

The long line of authority refusing to sustain convictions upon insufficient evidence need not be detailed at this juncture. We shall merely mention two recent instances of the application of the rule. In *Handford* v. *United States* (C. A. 5) 249 F. 2d 295 (advance sheets of January 6, 1958), Wisdom, Circ. J., wrote:

> "Mere knowledge of the commission of the crime by another does not prove guilt. Nor does mere presence at the scene. Possession must be proved by some showing of dominion and guilt."

In citing the foregoing case, we do not for a moment concede that there was any proof showing petitioner Gernie's knowledge. And, in *United States* v. *Safur* (C. A. 7), 251 F. 2d 30, Major, Circ. J., wrote:

> "A conviction upon insufficient proof, even in the absence of a motion for acquittal, would amount to a manifest miscarriage of justice."

Of course, herein the matter was duly protected by appropriate motions.

It is important to note that the District Judge recognized a difference between Second Circuit law and that prevailing elsewhere, for, when the defendants cited *United States* v. *Yeoman-Henderson* (C. A. 7) 193 F. 2d 867, the Judge said (R. 336-337):

> "* * * I want to say with respect to the rule of reasonable doubt as a matter of law, you are aware, since you brought this out, this Second Circuit does not subscribe to the opinion in some of the other circuits * * * I do not have the privilege of disagreeing with the Second Circuit."

In the Court of Appeals the Government urged (brief, p. 15) that the standard of evidence requisite to send a case to the jury was the same in both civil and criminal cases, citing the Second Circuit holdings in *United States* v. *Masiello*, 235 F. 2d 279, and *United States* v. *Castro*, 228 F. 2d 807. In the latter case, however, the late Circuit Judge Frank stated that different views were apparently entertained in other circuits, including the Third, Fifth, Eighth, Ninth, Tenth and the District of Columbia. To these we add the Fifth (see *Vick* v. *United States*, 216 F. 2d 228). Thus it may fairly be said that in seven other circuits a contrary view of the law is taken. Such a divergence in the law of the different circuits presents a classic case for the exercise of jurisdiction by the Supreme Court of the United States. The vast number of criminal prosecutions, as attested by the volume of reported cases, eminently requires that the liberty of an individual should not be dependent upon the circuit wherein he is tried. The confused state of the law on the subject calls for authoritative resolution.

Question No. 2

Whether the curtailment of cross-examination regarding Berner, a paid Government informer in this and other cases, coupled with the Government's failure to produce him or to account for his absence, was not in contravention of this Court's recent holding in *Roviaro* v. *United States*, 353 U. S. 53, 1 L. Ed. 2d 639.

This point is argued in extenso in our brief below (pp. 17-24), and is treated in some detail in the opinion of the Court of Appeals (pp. 670-673). That opinion places considerable stress upon a passage in the cross-examination of agent Wurms by Ogull's counsel from which it is inferred that counsel deliberately disclaimed any desire to know Berner's address. Actually the fair meaning of the inquiry is indicated by the words supplied in parentheses below:

> "Q. You have his (present) address, have you not? A. The last address.
>
> "Q. I don't want to know his (last) address. Does your office have his (present) address? A. One address in Brooklyn we had for him."

Unless the words supplied are understood, there would be no point whatsoever to the second question, "Does your office have his address?" If the construction we suggest is incorrect, the only other reasonable interpretation is that counsel was attempting to protect the agent's natural reluctance to impart knowledge of the whereabouts of the informer; still it was important to show that the agent had knowledge of where Berner could then be found. The opinion of the Court of Appeals takes the colloquy out of context, for the record is replete with proof that the Government advisedly sought to keep Berner out of Court.

The entire procedure followed by the Government with reference to Berner contravenes the principles enunciated in the *Roviaro* case, *supra*, as well as the holding in *United States* v. *Reynolds*, 345 U. S. 1, 97 L. Ed. 727.

Question No. 3

Whether it was not improper and prejudicial to petitioners for the Government to place on the stand a witness who it had reason to believe would, and actually did, in the presence of the jury, invoke the Fifth Amendment.

The two cardinal aspects of this point are: (1) the Government admittedly (R. 541-542) had reason to believe that Harell would invoke the Fifth Amendment; (2) the entire subject of the validity of the claim of privilege, actual or potential, should have been investigated by the trial Court in the absence of the jury. See *Wilmerding* v. *United States*, 4 F. 2d 209, cert. den. 267 U. S. 605, 69 L. Ed. 810.

The grave prejudice to the rights of petitioners is unquestionable. The assertion of the claim of privilege, popular as it may be in Congressional investigations, is relatively infrequent in the trial of any action or prosecution. It necessarily makes a deep impression upon jurors. They would be quite likely to draw this inference: the witness has previously admitted his guilt, and, while the Government wants him to implicate the defendants on trial, he declines to do so. Is his reason not rather to protect them than to shield himself? Is he not apprehensive of retaliation by them? In any case, the entire incident is indicative of defendants' guilt.

We would be the last to deny the wholesome invocation of the Fifth Amendment as a constitutional protection for all. But it should not be utilized as a tool to create prejudicial inferences against persons on trial for their liberty. It does not suffice to say that the trial would have been fairer had the incident been omitted. Since it is established that the Government had good reason to apprehend that a claim of privilege might be asserted, the matter should have been relegated to preliminary exploration, in

the absence of which the Government became endowed with a powerful weapon tending towards the deprivation of a fair trial.

Question No. 4

Whether it was not error to deny the defense motion to dismiss on the ground that entrapment of petitioner Ogull was established.

This question was summarily disposed of by the Court of Appeals, which took the position that it was one for jury determination, especially in view of the circumstance that the transactions covered a period of several months. A motion on petitioner Ogull's behalf duly reserved the point (R. 543), and it is clear that its validity would naturally inure to the benefit of petitioner Gernie.

The law on the subject has been clearly stated by this Court in *Sorrells* v. *United States*, 287 U. S. 435, 77 L. Ed. 413, and applied by the various circuits.

The Court of Appeals erred herein, it is submitted, in subscribing to the view that nothing more than a jury issue was presented, and in holding that the defense of entrapment was vitiated by the continuation of improper activities for some time, a ruling for which there appears to be no controlling authority.

Question No. 5

Whether it was not error to refuse a mistrial after the reception of incompetent and unresponsive testimony that petitioner Ogull planned to engage in the operation of a gambling house in violation of the California Penal Code.

This point was not discussed in the opinion, but we deem it important. Below we cited numerous authorities wherein convictions were reversed on the same ground. The fact that the point is elementary does not detract from its gravity. It is still the law, as stated in *People* v. *Horie*, 258 App.

Div. 246, 16 N. Y. S. 2d 235, that "the improper admission of evidence of other crimes constitutes a very serious infraction of the rights of a defendant."

Was it not enough that petitioners were confronted on the trial with the universal abhorrence of traffic in narcotics? Any one accused of such an offense, experience teaches, has an uphill fight in defending against the indictment. The interests of justice require that he be not subjected to the additional and crushing burden of insinuations of complicity in other crimes.

Question No. 6

Whether it was not error to deny a motion to strike incompetent and prejudicial testimony that petitioner Gernie at the time of his arrest had in his possession a certain marked bill more than two months after it had been paid to another person for narcotics by a Government agent.

The only reference to this testimony in the opinion of the Court of Appeals is the following (p. 667):

> "When Gernie was arrested 68 days later on September 18, he had in his wallet one of the $100 bills which Wurms had given to Buzzeo on July 12."

The same observation is repeated (p. 669), and the purpose of the Court in mentioning it is to support its argument of the sufficiency of the evidence to sustain petitioner Gernie's conviction.

In other words, the receipt of the testimony was not dismissed as harmless error. On the contrary, the Court of Appeals relied upon it as being indicative of guilt. This position, we submit, fortifies our argument that the evidence should never have been received. The holding is at variance with this Court's decision in *Williams* v. *United*

States, 168 U. S. 382, 42 L. Ed. 509, and squarely opposed to the Ninth Circuit view expressed in *Lee* v. *United States*, 245 F. 2d 322.

If the matter be regarded as one of original impression, it appears obvious that guilt may never be shown or even reenforced by a person's possession of a piece of marked currency several months after it constituted the consideration for an illegal transaction. That this altogether fortuitous circumstance should be regarded as incriminating accords neither with reason nor common sense. Otherwise the use of currency in the thousands of innocent transactions wherein it is employed every day would become fraught with peril. Certainly the evidence should not have been received herein.

Question No. 7

Whether in charging on the credibility of witnesses found to have testified falsely in one respect, the Trial Court did not err in omitting the necessary qualification that the testimony involved had to relate to material facts.

This point involves a controversial question on the law of evidence, wherein the Government placed strong reliance below on the opinion ventured in 3 Wigmore on Evidence, Sec. 1014. However, the Supreme Court of the United States has not always been in accord with Wigmore's views, notably rejecting them in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. Ed. 790. The question is especially important herein by reason of the fact that the case presented issues of the credibility of many witnesses.

Question No. 8

Whether in any event the cumulative effect of the errors urged was not such as to deprive petitioners of a fair trial.

The best that can be said for the Government's position is that the proof against petitioner Gernie was certainly not of a clear or conclusive character, while the proof against petitioner Ogull was strongly indicative of entrapment. The least weight ascribable to this aspect of the case is that they were entitled to a trial free from prejudicial error, so that incorrect rulings which might otherwise be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. See *Gordon* v. *United States*, 344 U. S. 414, 97 L. Ed. 447. Particularly where the case is "a close one" and not "open and shut," an error otherwise harmless will be deemed prejudicial. *Bihn* v. *United States*, 328 U. S. 633, 90 L. Ed. 1485. See also *United States* v. *Tomaiolo* (C. A. 2) 249 F. 2d 683 (advance sheets of January 27, 1958).

While petitioners have no inclination to press questions of fact, it is urged that the element of innocence should not impair the arguments presented to this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 173—October Term, 1957.

(Argued November 18, 1957 Decided February 13, 1958.)

Docket No. 24634

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GERNIE and EDWARD OGULL,

Defendants-Appellants.

Before:

HAND, MEDINA and LUMBARD,

Circuit Judges.

Appeal from conviction and prison sentence of 10 years for Gernie and 5 years for Ogull following their conviction by a jury in the Southern District of New York for violation of the narcotic laws, and conspiracy, 21 U. S. C. A. §§ 173, 174 and 18 U. S. C. A. § 371, Edmund L. Palmieri, *J.* Affirmed.

JEROME J. LONDIN and ROBERT B. FISKE, JR., Assistant United States Attorneys, Southern District of New York, New York, N. Y. (Paul W. Williams, United States Attorney, Southern District of New York, on the brief), *for appellee.*

JACOB W. FRIEDMAN, New York, N. Y., *for defendants-appellants.*

LUMBARD, *Circuit Judge*:

The four principal questions on appeal are (1) whether there was sufficient evidence to support Joseph Gernie's conviction, (2) whether the court erred in denying defense motion to dismiss the indictment against Ogull because of entrapment, (3) whether the court erroneously restricted cross-examination of narcotic agent Wurms regarding the whereabouts of the government's former special employee, Max Berner, who was not produced as a witness, and (4) whether it was error to call Benjamin Harell to testify in view of his claim of Fifth Amendment privilege.

Gernie and Ogull were charged, with Philip Buzzeo and Michael Mayer, with conspiracy to violate the narcotic laws during the period April 1, 1956-October 19, 1956 (Count 7). They were also charged with the sale of heroin: Ogull and Buzzeo on April 14, 1956 (Count 1), all four defendants on June 4, 1956 (Count 2), Gernie, Ogull and Buzzeo on July 12, 1956 (Count 3), Gernie and Mayer on August 2, 1956 (Count 4), and Gernie and Mayer on August 6, 1956 (Count 5). In addition, Gernie and Mayer were charged with possession of heroin on September 18, 1956 (Count 6), 21 U. S. C. A. §§ 173, 174; 18 U. S. C. A. § 371.

Buzzeo and Mayer pleaded guilty to all the charges against them and were sentenced respectively to 5 years in prison and a fine of $5,000, and 5 years, 6 months in prison.

At the end of a six day trial the jury found Gernie and Ogull guilty as charged on all counts, except Count 4 which had been withdrawn by the government at the end of its case.

On February 19, 1957, Judge Palmieri sentenced Gernie [1] to 10 years imprisonment and fined him $5,000, and Ogull to 5 years imprisonment on Counts 1, 2, 3 and 7, to be served concurrently.

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[1] Gernie's sentence was 5 years on Counts 2 and 3, and 10 years on Counts 5, 6 and 7, the sentences to run concurrently. A $5,000 fine on Count 7 was also imposed.

A narrative of the evidence concerning the clandestine operations of the four defendants over a period of several months discloses an abundance of evidence both direct and circumstantial to support the jury's verdict of guilty.

On April 13, 1956 government agents first made contact with the defendants when special employee Max Berner introduced agent Wurms to Edward Ogull in King's Diner at 360 Twelfth Avenue, New York. Ogull summoned Buzzeo by telephone. Finally Wurms, Buzzeo and Berner talked in a parked automobile and Wurms arranged to buy a quarter kilogram of 85% pure heroin from Buzzeo that night for $2,750. The delivery did not take place that night as scheduled as Buzzeo was cautious, and, after visiting several places with Wurms, he told Wurms that his people were satisfied and he would have to return the following evening to the Ship Ahoy Restaurant at 101 West 66th Street. On April 14 they went to a bar at 200 West 70th Street and from there to a Cadillac parked at 72nd Street and Riverside Drive. While they were driving east in the Cadillac Buzzeo handed Wurms a paper bag containing the heroin and Wurms paid him $2,750. As Wurms got out Buzzeo said if he wanted some more heroin he should contact Eddie, meaning Ogull.

Wurms, with Max Berner, again met Ogull on April 20 at McGinnis' Bar, 304 West 40th Street, and when Wurms complained of the "merry-go-round" he had gone on for the heroin, Ogull said he would not be put to such trouble in the future.

A week later, on April 27, Wurms and Berner went to the Scarlet Patch Bar, 403 East 57th Street and Wurms talked privately with Ogull who wanted to sell him cocaine. According to the government's case, Berner had no contacts with the defendants after April 27.

Wurms next telephoned Ogull on May 3 at Pier 74 at a number given him by Max Berner and Wurms and Ogull met later at the Scarlet Patch. Subsequent calls by Wurms on May 7, 10 and 11 were unproductive as Ogull said he

was unable to reach "Bob," referring to Buzzeo. At another meeting at the Scarlet Patch on May 22 Ogull rebuffed Wurms' suggestion that he be introduced to a new source of supply.

After a telephone call and meeting with Ogull, on June 1, Wurms met Buzzeo at the Ship Ahoy at 5:00 P. M. on June 2 where arrangements were made to deliver a quarter kilogram at the same place at 9:30 P. M. two days later.

On June 4, after a short talk at the Ship Ahoy, Wurms and Buzzeo drove in Buzzeo's Chevrolet to 76th Street where they parked near the Devonshire Garage just east of Broadway at 9:55 P. M. Wurms gave Buzzeo $3,000 in cash, Buzzeo left the car and entered the nearby Lighthouse Cafe where he made a telephone call. Five minutes later the defendant Gernie entered the cafe and joined Buzzeo at the bar. After a brief conversation, Gernie made a telephone call. Then both men went to the basement and returned to the bar a few minutes later. Gernie then went to the front window and looked out for about five minutes. At about 10:05 P. M. defendant Michael Mayer drove by in a 1955 Oldsmobile automobile usually driven by Gernie. Mayer proceeded to the Devonshire Garage where he parked and entered the garage office. When Mayer drove by the Lighthouse Cafe, Gernie turned abruptly, returned to Buzzeo at the bar and proceeded to the garage office where he met Mayer. Mayer then drove away in the Oldsmobile and Gernie returned to Buzzeo. They then left the cafe and proceeded to the garage office. Buzzeo remained in the office only a moment. Gernie watched him carefully as he returned to the car where Wurms was waiting. Wurms and Buzzeo drove off in Buzzeo's Chevrolet and, en route, Buzzeo handed Wurms a package containing the heroin.

Wurms next met with Ogull and Buzzeo on June 12 at Charlie's Diner, 394 Twelfth Avenue, where they discussed Wurms' complaint about the quality of the heroin purchased on June 4 and a reduction in price for the next purchase.

A July 11 meeting of Wurms and Buzzeo, arranged by Ogull, led to the sale of another quarter kilogram for $2,800 on July 12. Wurms and Buzzeo met at the Dolphin Cafe, 1975 Broadway at 9:30 P. M. and drove in Buzzeo's Chevrolet to the Devonshire Garage where they parked east of the office. Wurms gave Buzzeo $2,800 in bills the serial numbers of which he had recorded. A few minutes later Gernie drove into the garage entrance in the 1955 Oldsmobile. Gernie parked the car in the garage, met Buzzeo at the side door of the Lighthouse Cafe on 76th Street, they shook hands and went in and when they came out a few minutes later, Gernie was walking behind Buzzeo. They both went into the garage and Buzzeo got into Gernie's Oldsmobile, sat on the front seat for a moment with his feet remaining on the pavement, got out and spoke to Gernie, and then rejoined Wurms in the Chevrolet. Buzzeo then took a package from under his sport shirt and gave it to Wurms who later found that it contained heroin. When Gernie was arrested 68 days later on September 18, he had in his wallet one of the $100 bills which Wurms had given to Buzzeo on July 12.

Subsequent events in August further evidenced the business relationship of defendants Gernie and Mayer and the stealthy nature of their operations.

On August 2, 1956, two men, one of whom was Benjamin Harell, met Mayer at the West End Garage. Mayer immediately drove off in his Pontiac and went into 307 West 69th Street, where he lived. Gernie had already entered the building and his Oldsmobile was parked in the block at the time. Gernie came out of the building with Mayer and when Mayer drove off to a meeting with Harell, Gernie reentered 307 West 69th Street.

On August 6, 1956 Gernie drove up to 67th Street and Columbus Avenue, where he parked. Gernie walked over to Mayer's Pontiac and threw a dark package into it. He then entered the 67th Street Garage, where he met Mayer. Mayer immediately left the 67th Street Garage and drove

off in the Pontiac to 307 West 69th Street which he entered. Gernie was joined in the 67th Street Garage by Harell, who, after a brief conversation, drove away. Narcotic agents arrested Harell at 102nd Street and the East River Drive and found over 2 ounces of heroin.

Mayer was arrested on September 18, 1956 in 307 West 69th Street. In his pocket the agents found two double glassine envelopes containing about 1½ ounces of heroin. In Mayer's apartment the agents found 56 ounces of heroin in a leatherette case, several brown paper bags, and under his daughter's bed a Speed stapling machine and miscellaneous assorted equipment for the weighing, cutting and packaging of narcotics. There was expert testimony to show that the Speed stapling machine found in Mayer's apartment was the machine which pressed the staples to seal: (1) the quarter kilogram of heroin purchased on July 12, 1956 by Wurms, when Buzzeo got it from Gernie's Oldsmobile, and (2) the 2 ounces of heroin seized from Harell on August 6, 1956 after his meeting with Gernie.

Gernie was also arrested on September 18 and, in addition to the $100 bill already mentioned, he had in his possession the registration to the Oldsmobile car, although he denied having anything to do with the car or that he drove a car. Ogull, when he was arrested on October 4, denied that he had ever seen agent Wurms.

The mere recital of the evidence answers Gernie's claim that the evidence against him was insufficient. It was quite ample to sustain his conviction.[2]

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[2] Gernie did not take the stand, but instead called his co-defendant Michael Mayer who had already pleaded guilty. Mayer took the full blame for the transactions charged and said that Gernie had had nothing to do with them. However, his testimony regarding Gernie's visits to Mayer's apartment at 307 West 69th Street, Gernie's use of the Oldsmobile car which belonged to a mutual relative of Mrs. Mayer and Gernie, and his admissions to meeting Gernie at the Devonshire Garage to pick up the Oldsmobile, may have helped the government more than the defendant Gernie.

The second claim of error involves Ogull's defense of entrapment. Ogull took the stand and claimed that Max Berner and agent Wurms had entrapped him into arranging a contact with Buzzeo for the purchase of narcotics in return for their promising to help him in the financing of a real estate venture. Ogull admitted several meetings with Berner and Wurms and his introduction of Buzzeo to Wurms and claimed that he did not see them after July 12. As Wurms' version of the conversations and the dealings with Ogull was quite at variance with Ogull, who admitted that nothing was ever done for him with regard to any financing or any real estate, the issue of entrapment was a question of fact for the jury. Judge Palmieri's instructions on entrapment and on all phases of the case ... re clear and accurately guided the jury. In view of Ogull's activities lasting from April to August 1956, and, according to his own testimony, from April to July 12, 1956, and the insubstantial nature of his explanation for introducing Buzzeo to agent Wurms, the motion to dismiss was properly denied, and the judge was fully warranted in leaving the question of entrapment to the jury.

The third claim of error has to do with the curtailment of the cross-examination of agent Wurms regarding Max Berner, a special employee of the Narcotics Bureau, and the government's failure to produce him or to account for his absence.

A study of the record reveals that the defense had the means of securing information as to Berner's whereabouts and it chose not to secure the information. Indeed from what transpired at the trial we conclude that the defense abandoned its demand for Berner and that it cannot now claim that failure to produce him was error. Furthermore, there was no showing that the government had any more information as to Berner's whereabouts than was available to the defense.

On February 4, 1957, before the jury was selected, counsel for Ogull, in a conference held in the robing room, asked

the government "to have Mr. Berner here for me so that I may speak to him, because if the Government does not call him as a witness, and I feel the Government should, I might have to," because his testimony might have a bearing on the issue of entrapment. Counsel said he had been trying to find him but had been unable to locate him although he had known Berner for many years. He requested the court to ask the government to produce him "so I might speak with him."

The Assistant United States Attorney then stated that to the best of his knowledge Berner was not available and the government could not produce him and did not intend to use him.

The Court said to the Assistant "I would appreciate it if you communicate with the agent in charge of this case in order to ascertain his whereabouts, and if he can be made available, please see that that is done. If he can't, please advise me and the attorney as quickly as possible."

Counsel then argued that it was a "very unfair method of prosecuting" for the government not to produce Berner as its witness. The trial judge pointed out that he was not in a position to instruct the government how to prove its case, and he added "As the evidence proceeds you can make such motions and requests as you think you are justified in making."

The government's first witness, agent Wurms, was cross-examined at length regarding Max Berner. Part of the cross-examination went thus:

> "Q. You have his address, have you not? A. The last address.
>
> Q. *I don't want to know his address.* Does your office have his address? A. One address here in Brooklyn we had for him.
>
> Q. Do you know where his wife lives? A. Yes, sir.
>
> Q. Were you to his home? A. Yes, sir." (Italics supplied.)

Wurms testified further that he had last seen Berner in the latter part of September 1956 and that he had no information of his whereabouts.

But it is clear that Ogull's counsel deliberately chose not to ask for further and more specific information when agent Wurms testified regarding Berner's business association, that he had a Brooklyn address for Berner, that he knew where his wife lived and had been to his home. He said "I don't want to know his address."

On February 7, arguing a motion to dismiss at the end of the government's case, Ogull's counsel stressed the weakness of the case because of the failure to produce Berner but no further reference was made to the previous demand to produce Berner. In fact, after the first day of trial no further demand of any kind was made for Berner's production or for any information concerning him. It seems quite apparent that the subject of producing Berner was dropped by common consent. Ogull, perhaps because he knew Berner was not to be called as a witness, himself took the stand. Ogull's counsel may well have concluded that as things stood he no longer saw any advantage in pressing for Berner's appearance. He thus left the question open for argument to the jury that there was a vital weakness in the government's case by reason of Berner's failure to testify.[3]

Thus it appears that the defendant Ogull knew who Berner was and in fact had known him for two years. The government witness, agent Wurms, fully answered all questions which had any bearing on where Berner was or where he might be found. Even more, Wurms indicated his ability to give more detailed information regarding Berner and the defense chose not to follow it up.

Although on the first day of the trial the judge asked the Assistant United States Attorney to inform him and defense counsel if Berner could not be made available, no

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[3] We are not informed regarding the summation of Ogull's counsel. While it was recorded by stenographic notes, the notes have not been transcribed.

further mention was made of this request. The trial judge coupled his request with the statement to defense counsel that, as the evidence proceeded, he could make such motions and requests as he might wish. No further motion or request was ever made during the remaining week of the trial. Instead, defense counsel pursued a half-hearted cross-examination of Wurms on matters touching on Berner's whereabouts and thereafter counsel was content to drop the matter after it became clear that Berner would not be produced by the government.

Roviaro v. *United States*, 353 U. S. 53 (1956), relied on by the appellants, is not in point as the trial court there had sustained the government's refusal to divulge the name or whereabouts of "John Doe" by bill of particulars before trial and by cross-examination of the government's witnesses. In *Roviaro* the defense never did know who "John Doe" was. Here Ogull had known Max Berner for at least two years. *Sorrentino* v. *United States*, 163 F. 2d 627, cited with approval in *Roviaro* v. *United States*, 353 U. S. 53, 62, fn. 12.

Thus we come to the question of whether it was error for the government to call Benjamin Harell as a witness in view of his refusal to testify regarding the source of the heroin of which he had admitted possession on August 6, 1956.

After agents had observed Harell and one Joseph Edwards meet with defendant Gernie in the 67th Street Garage, he was arrest on the East River Drive in possession of 2 ounces of heroin. He was indicted on August 31, subsequently pleaded guilty to all three counts which charged unlawful possession of $2\frac{1}{2}$ ounces of heroin, and conspiracy with Edwards and others to traffic in narcotics in violation of law, and, prior to Gernie's trial, he was sentenced to 5 years imprisonment.

The government called Harell as its witness. Harell in answer to questions admitted that he had heroin in his possession when he was arrested in August, and that he had pleaded guilty to an indictment, and had received a 5 year sentence. When the prosecutor asked him where he ob-

tained the heroin he said he wanted to "take the Fifth Amendment" and refused to answer. The trial judge finally sustained Harell's refusal, and in his charge to the jury he instructed the jury that this refusal was not to be taken as evidence against the defendants.

The government had a right to call Harell to testify. The testimony of his meeting with Gernie and his possession of heroin immediately thereafter was material and relevant to the case. Had the government not produced him the defense could have argued that its failure to call him showed that he would not corroborate the testimony of the agents. Under such circumstances it makes no difference whether the government has reason to believe that the witness will refuse to testify. It has a right to produce the witness and thus show the jury that it is bringing forward such witnesses as may have knowledge bearing on the case. *United States* v. *Romero*, 249 F. 2d 371 (2 Cir. 1957) and *United States* v. *Cioffi*, 242 F. 2d 473, 477 (2 Cir. 1957).

Indeed the government had the right to compel Harell to answer the questions as he had pleaded guilty and could not be further incriminated by answering where he had obtained the heroin. *United States* v. *Romero*, *supra*; *United States* v. *Cioffi*, *supra*.[4] We think the judge erred in sustaining the witness' claim of privilege.

In any event the judge's charge that the jury was not to consider Harell's refusal as evidence against the defendants was all they were entitled to.

The other claims of error are too insubstantial to require comment. The judge quite properly admitted the $100 bill in evidence against Gernie.

Judgments of conviction are affirmed.

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[4] Thus we find it unnecessary to refer to additional facts which indicated that Harell had already talked freely on at least two occasions, and the prosecutor had reason to believe that he would answer questions again.

We also note that under the Narcotic Control Act of 1956, 18 U. S. C. A. § 1406, the prosecutor had the power to give the witness immunity and compel his answers, although the government did not choose to act under this statute after the judge sustained Harell's claim of privilege.